MOHD RAYMEE ISMAIL

v.

KETUA KOMANDAN, PUSAT SERENTI TIANG DUA, MELAKA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL APPLICATION NO: 44-46-98]
24 AUGUST 1998

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Order of residence - Detention of drug dependant at rehabilitation centre - Failure to supply copy of report by rehabilitation officer to applicant contrary to s. 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983 - Whether detention unlawful - Whether applicant should have applied by way of certiorari - Whether appeal to High Court lies against order of residence - Whether application by way of habeas corpus available to applicant - Federal Constitution, art. 5(2)*

ADMINISTRATIVE LAW: *Remedies - Certiorari - When ought an application in certiorari be brought - Order involving detention - Whether applicant must apply by way of certiorari - Whether application in habeas corpus equally available - Whether contrary to spirit and intent of art. 5(2) of Federal Constitution to require application by way of certiorari rather than by habeas corpus*

CONSTITUTIONAL LAW: *Fundamental liberties - Detention - Habeas corpus - Recourse to art. 5(2) Federal Constitution - When does writ of habeas corpus lie*

The applicant was held to be a drug dependant and was ordered by a magistrate to be admitted to Serenti Rehabilitation Centre pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). In supporting this application for a writ of *habeas corpus*, the applicant submitted an affidavit alleging, *inter alia*, that a copy of the report by the rehabilitation officer was not supplied to him contrary to s. 6(3) of the Act. No affidavit in reply was filed to contest this allegation.

The respondents objected to this application on the ground that the applicant should have applied by way of *certiorari* rather than by a writ of *habeas corpus*. It was contended that the order by the magistrate is a valid order until it has been set aside by a court of competent jurisdiction and that the correct procedure to do so would be by a writ of *certiorari*.

Held:

[1] The procedure for recourse pursuant to art. 5(2) of the Federal Constitution ('the Constitution') is normally by a writ of *habeas corpus*. The writ of *habeas corpus* is not limited to cases where a person has been arrested, but the true basis is that the person has been unlawfully detained. Thus a writ of *habeas corpus* may lie even though the initial arrest is lawful, but that by some subsequent non-compliance the continued detention becomes unlawful.

[2] An order under s. 6(1)(a) of the Act is made by a magistrate. Given that other provisions of the Act make references to the "Magistrate's Court", it appears that the legislature did not intend for the power under this section to be conferred on the Magistrate's Court, but rather on a magistrate.

[3] There is no restriction that a statute or law can confer a power or discretion upon a court only. Statute law may confer a power or discretion upon an official. In this case, a magistrate. Such statute or law may provide specific criteria to be applied, or procedure to be adhered to. Such power or discretion is generally described as exercised quasi-judicially. The power or discretion may not be exercised capriciously or at will. An order or decision is not strictly a judicial act and is better described as the action of a tribunal. The High Court nevertheless has an inherent supervisory jurisdiction over such lesser tribunals.

[4] Not supplying a copy of the report by a rehabilitation officer to the applicant is a breach of s. 6(3) of the Act. Indeed, since the consequence of an order under s. 6 of the Act is penal in character, there must be strict compliance with the terms of the legislation authorising the order.

[5] Section 307 of the Criminal Procedure Code provides that any person who is dissatisfied with any judgment, sentence or order pronounced by a Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order. However, as the order under s. 6 of the Act is not an order in a criminal case or matter, there can be no appeal under s. 307 of the Criminal Procedure Code.

[6] An application in *certiorari* is normally used to bring to the High Court the decision of an inferior tribunal or authority for review, and, where it does not pass the test, it is quashed.

[7] *Certiorari* is not an exclusive procedure. Not all orders under s. 6 of the Act involve detention. Where an order does not involve detention, the only course to quash such an order is an application in *certiorari*. However, in an order that involves detention, there is nothing to say that an application in *habeas corpus* is not available.

[8] To restrict a person by requiring that he must apply by way of *certiorari* rather than by *habeas corpus* would be contrary to the spirit and intent of art. 5(2) of the Constitution which does not impose a restriction as to the procedure of how a complaint is to be made. Indeed, art. 5(2) of the Constitution not merely empowers, but requires a High Court or judge thereof, upon receiving a complaint and unless he is satisfied that the detention is lawful, to issue an order for the detenue to be produced before the court and release him.

[9] While *certiorari* is a discretionary power, *habeas corpus* is as of right under art. 5(2) of the Constitution. Where it is not disputed that a copy of the report of the rehabilitation officer has not been supplied to the applicant, his detention under s. 6 of the Act is unlawful and the court must order the persons holding him to produce him before the court to be released.

[10] A writ of *certiorari* is the normal procedure to be adopted to quash an earlier order but a writ of *habeas corpus* becomes an available alternative where the earlier order involves detention. It would be contrary to the spirit and intent of art. 5 of the Constitution to refuse a writ of *habeas corpus* where it is clear that s. 6 of the Act has not been complied with. To reject the application and to require the applicant to apply by way of *certiorari* would in this case make the right under art. 5 of the Constitution illusory.

[Application allowed.]

Cases referred to:

Ahmad Bashid Abdul Malek & Yang Lain v. Timbalan Menteri Dalam Negeri, Malaysia & Yang Lain [1998] 2 CLJ 457 ***(not foll)***

Amand v. Home Secretary & Anor [1943] AC 147 ***(cit)***

Ang Gin Lee v. PP [1991] 1 MLJ 498 ***(foll)***

Bohari Sukimin v. Ketua Institusi Pusat Serenti Rawang & Anor (High Court Kuala Lumpur, Application 44-4-98) (unreported) ***(foll)***

Daud Salleh v. The Superintendent, Sembawang Drug Rehabilitation Centre [1981] 1 MLJ 191 ***(aff)***

Hoo Thian Siong v. PP [1988] 1 CLJ 176 ***(cit)***

Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers [1984] 2 CLJ 6 ***(aff)***

Maleb Su v. PP [1984] 1 MLJ 311 ***(cit)***

Mohd Shaipul Nizam Ahmad v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1998] 2 CLJ 875 ***(not foll)***

Mohd Shahriman Mohd Khairil v. PP [1998] 2 CLJ 875 ***(foll)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238 ***(aff)***
PP v. Chin Keow [1947] MLJ 55 ***(cit)***
PP v. Soh Ted Foh [1990] 2 MLJ 382 ***(cit)***
Re Makhanlall & Co Ltd [1969] 1 MLJ 36 ***(dist)***
Re Roshidi Mohamed [1988] 2 MLJ 193 ***(cit)***
Wong Kon That & Ors v. Ketua Komandan Pusat Serenti Karangan, Kulim & Anor [1998] 3 MLJ 380 ***(not foll)***
Wong Soo Teong v. Long Foo Kang & Anor [1996] 2 BLJ 47 ***(aff)***

Legislation referred to:
Criminal Procedure Code, ss. 307, 323
Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)(a), (3)
Federal Constitution, art. 5(2)

Other source referred to:
Judicial Review of Administrative Action, Lord Woolf & Jeffrey Jowell, 5th edn

For the appellant - TY Teh; M/s TY Teh & Partners
For the respondents - Mohd Abazafree Abbas DPP

Reported by S Dharmendran

JUDGMENT

Abdul Wahab Patail J:

The applicant was arrested on 13 March 1998 and brought before the magistrate on 25 March 1998, where he was ordered to be admitted to Pusat Pemulihan Serenti, Tiang Dua, Malacca for a period of two years under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (Act 283) ("the Act") which reads as follows:

> 6. Magistrate's order which may be made on a drug dependant.
>
> (1) Where a person who has undergone the tests referred to in section 3 or 4, and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate and if the Magistrate, after giving such person an opportunity to make representations:
>
> (a) is satisfied that such person requires to undergo treatment and rehabilitation at a Rehabilitation Centre, order such person to reside at such Centre for a period of two years to undergo treatment and rehabilitation and thereafter to undergo after-care in accordance with the provisions of this Act relating thereto; ...

(b) ...

Provided that where such person fails to execute such bond an order under paragraph (a) shall be made against him by the Magistrate.

(2) ...

(3) The Magistrate shall, before making an order either under paragraph (a) or (b) of subsection (a), consider a report by a Rehabilitation Officer on such person, a copy of which shall be supplied to such person, and which shall be read out and explained to him.

(4) In making an order under subsection (1), the Magistrate shall have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person against whom the order is pro-posed to be made.

(5) A certificate under subsection (1) purporting to be signed by a government medical officer or a registered medical practitioner shall be receivable by a Magistrate without proof of the signature thereon, and the Magistrate shall accept it as proof of its contents, unless the contrary is proved.

In the supporting affidavit to the application, it was alleged as follows:

5. Disini saya ingin merujuk kepada sesalinan nota-nota keterangan yang dilampirkan sebagai eksibit "I-2" (selepas dan ini dirujuk sebagai "Nota tersebut") dan mengatakan berikut:

(a) Seperti dengan laporan doktor dan laporan kimia saya diberitahu oleh pemohon bahawa laporan Pegawai Pemulihan Dadah ("Laporan PPD") tidak di sampaikan kepada pemohon. Nota tersebut yang mengatakan pemohon ada menerima laporan doktor dan laporan kimia adalah di nafikan. Tambahan, saya juga diberitahu oleh penama bahawa, dan oleh kerana saya juga berada di Mahkamah pada 25hb Mac, 1993, walaupun kedua laporan itu dibacakan kepada beliau, penama tidak diterangkan sebab dan akibat sekiranya penama mengakui dan/atau menyetujui laporan-laporan tersebut dan juga berkenaan perintah yang boleh dibuat terhadap penama. Pada ingatan kamu, pemohon tidak mengakui bahawa dia adalah seorang penagih dadah kepada Tuan Majistret;

(b) Selanjutnya, saya tahu Laporan PPD tidak diserahkan kepada penama. Saya juga diberitahu oleh penama dan berada di Mahkamah bila Laporan PPD dibacakan tetapi mengatakan kandungannya tidak diterangkan dan, oleh itu, kami memang tidak tahu dan tidak sedar akibat dan kesan sekiranya penama mengakui dan menyetujui Laporan PPD.

6. Dalam keadaan diatas, kami tidak tahu perintah yang boleh dibuat terhadap penama boleh memberi kesan seperti Perintah tersebut. Ini terutama bila kami diberitahu bahawa pengakuan Pemohon tidak akan memberi kesan seperti Perintah tersebut. Pemohon disyorkan bahawa beliau dapat diberikan bon atas pengakuan tersebut. Keluarga pemohon sekarang berasa kecewa dan dukacita atas penghantaran pemohon ke Pusat Serenti Tiang Dua Melaka selama 2 tahun. Walaupun Nota tersebut mengatakan Tuan Majistret, dalam keputusan beliau membuat Perintah tersebut, telah mengambilkira hal keadaan kes, watak, riwayat, umur, kesihatan, pelajaran, pekerjaan keluarga dan hal keadaan lain pemohon sendiri, kami mengatakan kehendak peruntukan seksyen 6(4) Akta tersebut tidak dipatuhi atas fakta-fakta yang disebutkan diatas. Tambahan, kami sememangnya memerlukan khidmat peguam sekiranya kesan atau akibat pengakuan pemohon diterangkan dan difahamkan.

There were no affidavits in reply filed to contest the above allegation. That being the case, the court must conclude that the allegations above are not denied and are therefore admitted to be true: see *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 3 MLJ 332.

Notwithstanding this grave non-compliance with the Act, Encik Mohd. Abazafree, federal counsel, has taken the unusual course of objecting to the application. The objection is purely on a technical point: that the applicant should have applied by way of *certiorari* rather than by a writ of *habeas corpus* as employed in this application.

It was urged upon this court that the order made by the magistrate is a valid order until it has been set aside by a court of competent jurisdiction, and that the correct procedure to do so would be by a writ of *certiorari.*

It has been held by the High Court in *Ahmad Bashid Abdul Malek & Yang Lain v. Timbalan Menteri Dalam Negeri, Malaysia & Yang Lain* [1998] 2 CLJ 457, *Mohd Shaipul Nizam Ahmad v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1998] 2 CLJ 875 and *Wong Kon That & Ors v. Ketua Komandan Pusat Serenti Karangan, Kulim & Anor* [1998] 3 MLJ 380 that the hearing before the magistrate is a judicial hearing and that such order remains valid until it has been set aside by a court of competent jurisdiction, and that the appropriate procedure for doing so is by way of a writ of *certiorari* and not by way of a writ of *habeas corpus*. However other High Courts in *Mohd. Shahriman Mohd Khairil v. PP* [1998] 2 CLJ 875 and *Bohari Sukimin v. Ketua Institusi Pusat Serenti Rawang & Anor* (Kuala Lumpur High Court, Application 44-4-98) took the view that an application for a writ of *habeas corpus* is available also.

The starting point is art. 5(2) of the Federal Constitution of Malaysia which provides as follows:

> Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him.

The procedure to do so is normally by a writ of *habeas corpus*. Lest it be misunderstood, the writ of *habeas corpus* is not limited to cases where a person has been arrested, but the true basis is that the person has been unlawfully detained. Thus a writ of *habeas corpus* may lie even though the initial arrest is lawful, but that by some subsequent non-compliance the continued detention becomes unlawful. Thus the explanation of Lord Woolf and Professor Jeffrey Jowell in their book *'Judicial Review of Administrative Action'* (Fifth Edn) is in closer accord with the language of art. 5(2) of the Federal Constitution:

> The specific purpose of the remedy is to secure the release of a person who is unlawfully detained.

The applicant, pursuant to an order under s. 6(1)(a) of the Act, is being held in Pusat Pemulihan Serenti, Tiang Dua, Malacca. That the order amounts to a detention at Pusat Pemulihan Serenti, Tiang Dua, Malacca is not at issue since there is no question that the applicant could walk out of that place at any time that he may wish.

Now an order under s. 6(1)(a) of the Act is made by a magistrate. Given that other provisions of the Act made references to the "Magistrate's Court", it appears that the legislature did not intend that the action under this section should be that of a magistrate's court, but rather of a magistrate. The Supreme Court in *Ang Gin Lee v. PP* [1991] 1 MLJ 498 dealt with this question and concluded:

> In a careful judgment, the learned judge based his rulings on two main grounds. First the learned judge found that the powers conferred on the magistrate by s. 6 of the Act under which the order was made is expressly conferred on the 'Magistrate' as distinct from 'Magistrate's Court' and that s. 24(1) of the same Act specifically provides that any power or jurisdiction conferred on a magistrate under ss. 4 and 6 (amongst others) over matters specified therein may be exercised by the magistrate at any place whether such matters arose within or outside, the local jurisdiction of the magistrate or within or outside the local limits of his court notwithstanding anything to the contrary in the Subordinate Courts Act 1948 or the Criminal Procedure Code (FMS Cap 6) or any other written law.

> At a glance this first ground may seem pedantic but a closer examination of provisions of law relating to the jurisdiction of the magistrate shows the merit of this ground.

The Supreme Court, while appreciating that the order under s. 6 of the Act is penal in nature in that the person is probably being held against his will, accepted *Maleb bin Su v. PP* [1984] 1 MLJ 311 that the magistrate's decision is final, and the reasoning of *PP v. Chin Keow* [1947] MLJ 55 and *Amand v. Home Secretary & Anor* [1943] AC 147 that the order of the magistrate under s. 6 of the Act is not in respect of a criminal case or matter.

Section 307 of the Criminal Procedure Code provides that any person who is dissatisfied with any judgment, sentence or order pronounced by a Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order. The order under s. 6 of the Act not being an order in a criminal case or matter, there can be no appeal under s. 307 of the Criminal Procedure Code.

The Supreme Court concluded in *Ang Gin Lee v. PP* that:

> The criminal jurisdiction of a First Class Magistrate is provided in s. 85 of the Subordinate Courts Act 1948. Section 26 of the Courts of Judicature Act 1964 (Act 91) provides that the appellate criminal jurisdiction of the High Court shall consist of 'the hearing of appeals from subordinate courts according to any law for the time being in force within the territorial jurisdiction of the High Court.' The term 'subordinate court' is defined in 3 of Act 91 to mean any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court.
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> It would seem to us that the legislative scheme of s. 6 of the Act viewed with the provisions of criminal jurisdiction and appeal in the two legislation referred to show quite clearly that the order of the Magistrate under s. 6 of the Act is not an order appealable to the High Court .... .

There is no restriction that a statute or law can confer a power or discretion upon a court only. Statute law may confer a power or discretion, upon an official. In this case a magistrate. Such statute or law may provide specific criteria to be applied, or procedure to be adhered to. Such power or discretion is generally described as exercised quasi-judicially. The power or discretion may not be exercised capriciously or at will. But while an order or decision under such power or discretion, is not strictly a judicial act, it is better described as the action of a tribunal. The High Court nevertheless has an inherent supervisory jurisdiction over such lesser tribunals.

The Federal Court described this function in *Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1984] 1 MLJ 363, 371 as follows:

> In the exercise of its inherent supervisory jurisdiction over inferior tribunals of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. ...

Not supplying a copy of the report by a rehabilitation officer to the applicant, as alleged at para. 5(b) of the supporting affidavit and which allegation was not denied by the respondents, is in clear breach of s. 6(3) of the Act. Indeed, since the consequence of an order under s. 6 of the Act is penal in character, there must be strict compliance with the terms of the legislation authorising the order: see *Daud bin Salleh v. The Superintendent, Sembawang Drug Rehabilitation Centre* [1981] 1 MLJ 191; *Wong Soo Teong (trading as Chop Yeok Lan) v. Long Foo Kang & Anor.* [1996] 2 BLJ 47.

An application in *certiorari* is normally used to bring to the High Court the decision of an inferior tribunal or authority for review, and, where it does not pass the test, it is quashed. An example is the case of *Re Makhanlall & Co Ltd* [1969] 1 MLJ 36. In that case the magistrate was found to have acted in excess of his jurisdiction under the Local Government Integration Ordinance 1961 and as a result the order had to be quashed by *certiorari*. *Mohd Shaipul Nizam Ahmad v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors, Ahmad Bashid Abdul Malek & Yang Lain v. Timbalan Menteri Dalam Negeri, Malaysia & Yang Lain and Wong Kon That & Ors v. Ketua Komandan Pusat Serenti Karangan, Kulim & Anor* therefore took the view that the appropriate procedure is to proceed by way of *certiorari* and not by *habeas corpus.*

I would respectfully agree that *certiorari* is the logical course, since the respondents in this case are lawfully holding the applicant pursuant to an order of the magistrate under s. 6 of the Act. But that is not to say it is necessarily the only course open to the applicant. Regrettably it does not appear from the judgments above that this was urged upon the High Court for consideration.

It is to be noted that *Re Makhanlall & Co Ltd* did not involve the detention of any person. *Habeas corpus* did not arise in that case. More importantly, in *Ang Gin Lee v. PP*, the Chief Justice (Malaya), delivering the judgment of the Supreme Court, having concluded that there is no appeal against an order of the magistrate under s. 6 of the Act, proceeded to cite three cases under s. 6 which had been brought before the High Court: *Hoo Thian Siong v. PP* [1988] 1 CLJ 176; [1988] 2 MLJ 401, *Re Roshidi bin Mohamed* [1988] 2 MLJ 193 and *PP v. Soh Ted Foh* [1990] 2 MLJ 382. *PP v. Soh Ted Foh* was brought to the High Court by way of revision, having been referred to it under s. 323 of the Criminal Procedure Code. Closer to the circumstances of this

case are *Hoo Thian Siong v. PP* and *Re Roshidi bin Mohamed,* in respect of which the Chief Justice had this to say:

> To complete the record it may be noted that there are at least three reported cases brought to the High Courts by persons affected by an order under s. 6 of the Act.
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> One is *Hoo Thian Siong v. PP* which was an application for *habeas corpus* challenging the order of the magistrate on the ground that he was not represented by counsel at the hearing. The learned judge there, Mustapha Hussain J, ruled that it was encumbent on the learned magistrate to give the applicant the opportunity of making a representation.
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> There was also an application made to the High Court in Kangar in *Re Roshidi bin Mohamed.* There the applicant contended that the magistrate did not comply with the various subsections of s. 6 of the Act. The learned judge, Mohamed Ariff J, held that in the absence of the record of proceedings kept by the learned magistrate it was impossible to hold that the mandatory requirements of the law had been complied with and granted the application.

It is clear that the Supreme Court accepted that an application in *habeas corpus* is an available procedure. The conclusion is that *certiorari* is not an exclusive procedure. It ought to be kept in mind that not all orders under s. 6 of the Act involve detention. Where an order does not involve detention, the only course to quash such an order is an application in *certiorari.* However, in an order that involves detention, there is nothing to say that an application in *habeas corpus* is not available.

To restrict a person by requiring that he must apply by way of *certiorari* rather than by *habeas corpus* would be contrary to the spirit and intent of art. 5(2) of the Federal Constitution which does not impose a restriction as to the procedure how a complaint is to be made. Indeed art. 5(2) not merely empowers, but requires a High Court or judge thereof, upon receiving a complaint and unless he is satisfied the detention is lawful, to issue an order for the detenue to be produced before the court and release him. While *certiorari* is a discretionary power of the High Court, a *habeas corpus* is as of right under art. 5(2) of the Federal Constitution. Where it is not disputed that a copy of the report of the rehabilitation officer has not been supplied to the applicant, it is abundantly clear his detention under s. 6 of the Act is unlawful and the court must order the persons holding him to produce him before the court to be released.

Dato' Suriyadi Halim Omar J and Dato' Chin Fook Yen J in *Mohd Shahriman Mohd Khairil v. PP & Anor;* and *Bohari Sukimin v. Ketua Institusi Pusat Serenti Rawang & Anor* respectively, discussing on the basis of largely different sets of case references, held that a writ of *habeas corpus* is available in addition to *certiorari* where detention is involved. I respectfully agree with their conclusions.

To summarise, even though normally a writ of *certiorari* is the procedure to be adopted to quash the earlier order, a writ of *habeas corpus* becomes an available alternative where the earlier order involves detention. It would be contrary to the spirit and intent of art. 5 to refuse a writ of *habeas corpus* where it is clearly undisputed that s. 6 of the Act has not been complied with. To reject the application and to require the applicant to apply by way of *certiorari* would in this case make the right under art. 5 illusory.

The objection is therefore dismissed.